No. 91-636

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM, 1992

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF *AMICUS CURIAE*, WHATCOM COUNTY, IN SUPPORT OF THE RESPONDENTS

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March 5, 1992

QUESTION PRESENTED

Do a state statute and county policy, which are both part of a state-wide waste management effort, constitute a *per se* violation of the commerce clause where they allow one county to exclude all waste produced outside that county?

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INTEREST OF *AMICUS CURIAE*

Whatcom County, Washington, currently seeks to enforce a safety ordinance that bans the importation of infectious medical waste into its borders. (Medical waste includes such items as contaminated blood, amputated limbs, and radioactive chemicals.) In 1991, a federal magistrate of the Western District of Washington invalidated the ordinance as violating the dormant commerce clause. Whatcom County appealed this decision to the Ninth Circuit; a decision is not expected until the fall of

1992. Because the issue presented in the present case is a primary issue in Whatcom County's case, Whatcom County wishes to express its views as an amicus curiae in this case.[1]

INTRODUCTION

Amicus Curiae, Whatcom County, fully supports the briefs presented by respondents, Michigan Department of Natural Resources (hereinafter Michigan DNR) and St. Clair County. Whatcom County further agrees with its fellow amici, the states of Alabama, Arizona, Delaware, Indiana, Kentucky, and Virginia, who have together filed an amicus curiae brief (hereinafter Amicus Brief of Kentucky) supporting the respondents.

Whatcom County writes separately to emphasize three points: (1) that heightened scrutiny under the *per se* rule established in *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) should not be extended to apply to border restrictions drawn on local, as opposed to state, lines; (2) that because of the special environmental characteristics of waste, heightened scrutiny under the *per se* rule should not apply to either state *or* local laws that regulate waste disposal; and (3) that in the event this Court analyzes this case under the quarantine exception, it should follow the traditional reasoning expressed in such cases as *Asbell v. Kansas*, 209 U.S. 251 (1908) and *Reid v. Colorado*, 187 U.S. 137 (1902), which upheld bans that reasonably sought to protect against health hazards, *despite* the discriminatory nature of the bans. To the extent *Philadelphia v. New Jersey* conflicts with the latter two points, Whatcom County respectfully suggests the case be modified.

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[1]Whatcom County, a political subdivision of the state of Washington, is permitted to file this amicus curiae brief under Supreme Court Rule 37.5. The Whatcom County Council has authorized Counsel to submit this brief on its behalf. *See* Letter from Daniel M. Warner, Chairman, dated February 12, 1992, accompanying this brief.

SUMMARY OF ARGUMENT

I. Although the commerce clause is phrased as an affirmative grant of power to Congress, this Court has also read the commerce clause to grant courts an *implicit* authority to limit state restrictions on interstate trade. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). Because application of this "dormant" commerce clause powers requires interpreting an unwritten constitutional directive, this Court should take care not to overstep its "limited authority" in this area. *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S 129, 295 (1968). Judicial caution suggests that the use of heightened scrutiny be limited only to situations involving state-line restrictions, that the use of heightened scrutiny be limited to restrictions targeting commercial goods *other than waste*, and that the traditional exception to the dormant commerce clause, the quarantine exception, be preserved.

II. In determining whether a governmental entity has overstepped its role in regulating interstate commerce, this Court has established a two-step inquiry. First, a court will determine whether the regulation affirmatively discriminates against interstate trade. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). A regulation that so discriminates is virtually invalid *per se*. *Id.* at 624. A regulation that does not so discriminate will be reviewed under the more flexible test set forth in *Pike v. Bruce Church*, Inc., 397 U.S. 137, 142 (1970). *Id.*

A. Currently, heightened scrutiny under the *per se* rule applies only to state-line restrictions. *See City of Philadelphia*, 437 U.S. at 624. Cases offered by Petitioner intended to show the contrary are unpersuasive. In these three cases, which struck down restrictions burdening trade both inside and outside the state, this Court did not summarily reject the

restrictions under a *per se* rule. Rather it inquired into the purpose and reasonableness of these restrictions, much as the *Pike* test requires. *See, eg., Dean Milk Company v. Madison*, 340 U.S. 349, 353-54.

B. This Court should not extend the *per se* rule to local restrictions because such an extension would be inconsistent with the dormant commerce clause principle of "virtual representation" and would needlessly hamper local efforts to protect health and safety. Since the inception of a dormant commerce clause doctrine, this Court has repeatedly emphasized the doctrine's concern over protecting out-of-state parties whose political interests are not protected within the state from burdensome state regulation. *See Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 465, 473 n.17 (1982); *South Carolina State Health Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938). Because Michigan's waste restrictions burden both in-state and out-of-state entities, the interests of outside individuals are "virtually represented" by those individuals inside the state who are similarly burdened. Where this representational purpose of the dormant commerce clause is met, heightened scrutiny under the *per se* rule is unnecessary.

Heightened scrutiny of local restrictions is also unnecessary because state subdivisions, unlike states, need not be presumed to harbor isolationist intentions. Localities within the same state share a similar culture, state government, and economic base. The very immediacy of their interdependence serves to temper isolationist tendencies. Heightened scrutiny here would simply hamper localities in addressing complex environmental problems with innovative solutions. *See FERC v. Mississippi*, 456 U.S. 747, 786 (1982) (O'Connor, J., concurring in part and dissenting in part) (praising local solutions to environmental problems).

III. Whatcom County supports Michigan DNR and Kentucky in arguing that heightened scrutiny under the *per se* rule should not be applied to state or local restrictions on waste. To the extent *City of Philadelphia* proves inconsistent with these arguments, Whatcom County respectfully suggests it be modified.

A. Since *City of Philadelphia*, plaintiffs, courts, and commentators have viewed the *per se* rule as a mandate on national environmental policy. Such court-imposed environmental policy is not intended by the commerce clause and usurps power from Congress and from state and local legislatures. Courts should, therefore, review waste restrictions with deference.

B. Even if the dormant commerce clause granted courts the authority to rigorously protect an unrestricted national waste stream, such a plan would be undesirable, given that many more powerful states would use such a policy to exploit the land of smaller and weaker neighbors.

C. This Court need not fear that by treating waste as something other than commerce, that it would be inadvertently limiting Congress' ability to regulate waste or the courts' authority to protect against true violations of dormant commerce clause principles. Congress maintains the right to regulate even items that are not themselves commercial goods as long as they *affect* interstate commerce. *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937). Courts would retain the right under *Pike* to review regulations *affecting* interstate commerce even though commercial goods are not directly implicated. *See Pike*, 437 U.S. at 137.

IV. Whatcom County takes no position on whether or not Michigan's waste restrictions constitute and permissible quarantine in this case. Should this Court decide to review the restrictions under quarantine analysis,

Whatcom County urges this Court to adhere to the standards already set down in *Reid v. Colorado*, 187 U.S. 137 (1902), *Asbell v. Kansas*, 209 U.S. 251 (1908), and *Maine v. Taylor*, 477 U.S. 131 (1986). Under these cases, a court will uphold restriction against the importation of noxious commercial goods where reasonably intended to protect public health, despite the fact that the regulation may target dangers associated with more than transportation, and despite the fact that identical noxious goods within the state may be treated differently. To the extent that *City of Philadelphia* is inconsistent with these cases, Whatcom County respectfully suggests it be modified.

ARGUMENT

I. The Court Should Approach Any Application of Its Dormant Commerce Clause Authority With Extreme Caution.

The commerce clause of the U.S. Constitution states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ." U.S. Const., art. I, § 8, cl. 3. Although it is phrased in terms of an affirmative grant of power to Congress, this Court has also read the commerce clause to *implicitly* limit "the power of the States to erect barriers against interstate trade." *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). Nowhere in the Constitution did the Framers explicitly protect unfettered trade among the states. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425, 429 (1982). The lack of any explicit free market ideal in the Constitution has been described as one of the "great silences" of the document. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949).

Because any application the dormant commerce clause inevitably requires interpreting a "silence," courts should be careful not to overstep their

"limited authority to review state legislation under the Commerce Clause." *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 295 (1968). In the words of Justice Black, "[t]he Constitution gives [Congress] the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution." *Northwest Airlines v. Minnesota*, 322 U.S. 292, 302 (1943) (Black, J., concurring), *quoted in Kassel v. Consolidated Freightways*, 450 U.S. 662, 690 (1981) (Rehnquist, J., dissenting).

A failure to exercise appropriate caution can undercut democracy in several ways. It can encourage courts to substitute their own economic or social policies for locally based legislative efforts—stifling not only self-rule[2], but innovative solutions to new problems.[3] It can encourage politically influential groups to seek remedies in judicial rather than legislative forums.[4] Finally, it can encourage Congress to abdicate its own constitutional authority over the regulation of interstate trade and areas affecting it. *See* Eule, *supra*, at 44-45.

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[2]"[P]ublic policy can, under our constitutional system, be fixed only by the people acting through their elected representatives." *Brotherhood*, 393 U.S. at 138; *see also Kassel*, 450 U.S. at 689 (Rehnquist, J., dissenting) (invalidating unwarranted state intrusion under the dormant commerce clause "is a far cry from simply undertaking to regulate when Congress has not because we believe such regulation would facilitate interstate commerce").

[3]*See* discussion, *infra*, at II.B.2.b.

[4]In the present case, for instance, the Environmental Transportation Association (a "business association representing entities concerned with the interstate transportation of waste") appeared in this case as an amicus curiae last year in order to help persuade this Court to strike down Michigan's importation restrictions. Brief of Amicus Curiae in Support of Petition for Writ of Certiorari, dated December 5, 1991. In the same year Congress, itself, debated several proposals intended to regulate the interstate transportation of solid waste. *Senators See "Civil War" Over Waste Imports*, Env't Rep. (BNA) 485-86 (June 21, 1991).

Judicial restraint proves especially vital in the context of environmental protection and waste disposal, where deep factual inquiry and legislative innovation are high priorities. *See* discussion, *infra*, at I.B.2.b. Whatcom County believes these concerns justify limiting the use of heightened scrutiny to state-line regulations, limiting the use of heightened scrutiny to commercial goods *other than waste*, and preserving the traditional exception to dormant commerce clause analysis, the quarantine exception.

II. Michigan's Waste Restrictions Do Not Discriminate Against Interstate Commerce Either on Their Face or in Practical Effect Because They Do Not Affirmatively Discriminate Between In-State and Out-of-State Waste.

In determining whether a governmental entity has overstepped its role in regulating interstate commerce, this Court has established a two-step inquiry. First, a court will review a regulation under a threshold test to determine if it affirmatively discriminates against interstate trade. *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, 4124 n.12 (1992); *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Regulations that do discriminate in this way are "basically protectionist measure[s]" and are subject to a "virtual[ ] *per se* rule of invalidity."[5] *City of Philadelphia*, 437 U.S. at 624; *see also Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979).

If a regulation does not affirmatively discriminate against interstate trade, the *per se* rule does not apply. In that case a court will review the regulation under a second, "much more flexible" balancing test, established

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[5]Under the *per se* rule, a regulation will be struck down unless it serves a legitimate purpose that cannot be achieved by an available nondiscriminating means. *Maine*, 477 U.S. at 138.

in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[6] *City of Philadelphia*, 437 U.S. at 624.

A. City of Philadelphia Holds Only That State-Line Barriers Are Per Se Invalid.

According to *City of Philadelphia*, the virtual *per se* rule applies to "simple economic protectionism" that is "effected by *state* legislation." *City of Philadelphia*, 437 U.S. at 624 (emphasis added). "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a *State's* borders." *Id.* (emphasis added); *see also Maine*, 447 U.S. at 148 n.19 (*per se* rule protects "out-of-*state*" competitors from discrimination against "*interstate*" trade) (emphasis added); *Baldwin v. GAF Seelig*, 294 U.S. 511, 523 (1935) ("peoples of the several *states* must sink or swim together") (emphasis added).

In *City of Philadelphia*, the Court struck down a New Jersey statute that banned virtually all waste imported from outside the *state*. Applying the virtual *per se* rule, this Court found the statute unconstitutional. The holding in *City of Philadelphia*, thus, stands for only one proposition: a state that offers disposal services for garbage within its borders may not ban the importation of garbage from outside its borders.

Petitioner argues that, despite the language emphasizing state-line restrictions in *City of Philadelphia*, past precedent requires that the *per se*

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[6]Under the *Pike* test:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate trade are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . if a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike, 437 U.S. at 137.

rule apply to city-line and county-line restrictions as well. Brief of Petitioners at 20-22. Specifically, they suggest this Court enunciated such a principle in *Dean Milk Company v. Madison*, 340 U.S. 349 (1951), *Brimmer v. Rebman*, 138 U.S. 78 (1981), and *Polar Ice Cream and Creamery Company v. Andrews*, 375 U.S. 361 (1964).[7] Ultimately, however, these cases do not support such a view. For although each of them does invalidate a city-line restriction under the dormant commerce clause, *none* of them summarily rejects a local restriction under a *per se* rule of invalidity—a test not formalized until 28 years after *Dean Milk*.

In *Dean Milk*, for instance, this Court opened its analysis by acknowledging that Madison's ordinance placed an "undue burden" on interstate trade and erected "an economic barrier protecting a major local industry against competition from without the state." *Dean Milk*, 340 U.S. at 353-54. These findings, irrelevant under the *per se* test,[8] closely resemble the inquiries into legitimate interests and undue burdens now codified in the *Pike* test. *See Pike*, 397 U.S. at 142.

Similarly, in *Polar Ice Cream* and *Brimmer*, this Court analyzed local restrictions under the dormant commerce clause by inquiring into factors that were necessary under the current *Pike* test but irrelevant under today's *per se* test. *Polar Ice Cream*, 375 U.S. at 377 (finding the regulation's "sole" purpose as economically isolationist and describing the regulation

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[7]On its surface, such an argument is not without persuasive force. In 1991, a federal magistrate struck down Whatcom County's county-line restriction on medical waste as *per se* invalid under this theory. *See BFI Medical Waste Systems, Inc. v. Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991) *appeal filed*.

[8]*City of Philadelphia*, 437 U.S. at 626-28 (striking down state-line restriction as virtually *per se* invalid without inquiring into the statute's purpose or the degree of burden it imposed).

as "hostile in conception as well as burdensome in result"); *Brimmer*, 138 U.S. at 82 (rejecting law's expressed purpose as a "guise" to favor local industry).

The question of whether the *per se* test under *City of Philadelphia* should be extended to restrictions drawn on local lines, is, therefore, one of first impression before this Court.[9] Determining whether to extend this test to the context of local restrictions requires an understanding of the fundamental principles behind the dormant commerce clause and of the political nature of state subdivisions.

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[9]Contrary to Petitioner's suggestion, lower courts have not seriously disagreed in determining whether or not the *per se* rule should be extended to local restrictions. Except for one instance, all federal courts (including the federal appellate court in this case), when faced with a restriction drawn on a local boundary, have declined to apply the *per se* rule and have instead analyzed the restrictions only under the *Pike* balancing test. *See, e.g.*, *Diamond Waste, Inc. v. Monroe County, G.A.*, 939 F.2d 941 (11th Cir. 1991) (invalidating county-line waste restriction under *Pike* test); *Evergreen Waste Systems v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987) (upholding tri-county-line waste restriction under *Pike* test); *County of Washington v. Casella Waste Management, Inc.*, No. 90-CV-513, 1990 WESTLAW 208, 709 (N.D.N.Y. Dec. 6, 1990) (upholding county-line waste restriction under *Pike* test); *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991) (same). *But see Whatcom County*, 756 F. Supp. at 485. (invalidating county-line waste restriction under the *per se* rule) *appeal filed*.

Although the analysis in these cases is not always elaborate, their results do suggest a sensitivity to two fundamental policy considerations: the nature of dormant commerce clause protection and the democratic nature of political subdivisions.

B. Extending the Per Se Rule to Local Restrictions Would Violate a Fundamental Principle of the Dormant Commerce Clause and Unduly Hamper Local Governments in Protecting Public Safety and the Environment.

1. Because the Dormant Commerce Clause Primarily Protects the Virtual Representation of State Outsiders, Local Restrictions That Adversely Affect In-State Interests as Well as Out-of-State Interests Do Not Violate This Principle and Should Be Afforded Deference.

Although Petitioner correctly points out that one concern behind the dormant commerce clause is the preservation of a national market,[10] this value is not the sole or even the primary value upon which the dormant commerce clause was founded.[11] Since the inception of a dormant commerce clause doctrine, the Court has repeatedly emphasized the doctrine's power to protect out-of-state parties whose political interests are not protected within the state from burdensome state legislation. As Justice Stone wrote earlier this century:

> Underlying the stated rule [of the dormant commerce clause] has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally on those without the state, legislative action is not

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[10]*See* Brief for Petitioner at 13-14, *quoting Baldwin*, 294 U.S. at 522.

[11]Indeed, properly speaking, the commerce clause does not establish the protection of a national market as a fundamental constitutional value at all. Rather, it leaves to Congress the authority to protect, restrict, or even eliminate free interstate trade, as it sees fit. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 197 (1824) ("[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this . . . [instance] the sole restraints . . . to secure them from its abuse"); *see also Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 434 (1946); Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 78 n.31 (1980) ("[t]he assumption that the commerce clause embodies a free trade value . . . is erroneous"). At the Constitutional Convention, in fact, attempts to articulate more explicitly the importance or protection of a free national market were ultimately rejected. *See* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev., 432, 433-37 (1941).

> likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state. [Citations omitted.]

South Carolina State Health Dept. v. Barnwell Bros , 303 U.S. 177, 185 n.2 (1938); *cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819) (striking down Maryland tax on federal instrumentality in part because the tax operated on national population not represented in state legislature). This Court has echoed the belief that the dormant commerce clause provides a guarantee of "virtual representation" to state outsiders since that time. *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 465, 473 n.17 (1982) ("[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse") (quoting *Barnwell Bros.*, 303 U.S. at 187); *Kassel*, 450 U.S. at 675 (where *the burdens* of legislation are felt both inside and outside a state, "States own political process will serve as a check against unduly burdensome regulation"); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978) (deference to highway regulations derives in part from belief that where in-state interests are burdened, "a State's own political processes" will guard against burdensome regulation); *Edwards v. California*, 314 U.S. 160, 174 (1941) ("indigent non-residents who are the real victims of the statute [that penalizes bringing indigent people into the state] are deprived of the opportunity to exert political pressure upon [that state's] legislature').[12]

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[12]Commentators, too, have noted the essential role the dormant commerce clause plays in guaranteeing virtual representation among residents of different states. *See* J. Ely, *Democracy & Distrust*, 83-85 90-91 (1980) (the commerce clause is, in part, an "equality" provision "guaranteeing virtual representation to the politically powerless"); Eule, *supra*, at 428, 437-442 ("[t]he contemporary dangers of state parochialism [which the dormant commerce clause prohibits] lie in its evisceration of the democratic process, not in its impairment of free trade"); L. Tribe, American Constitutional Law, 409-10 (2d. Ed. 1988).

The notion that the dormant commerce clause protects not only free markets, but also political representation, is reflected in the structure of the current two-tier test used when analyzing modern dormant commerce clause issues. The first tier, the *per se* rule, will strike down any law that discriminates on a state line, however well intentioned or however small its burden on interstate commerce might be. Certainly not all state discriminatory laws necessarily burden free trade; but all such laws *do* violate the principle of virtual representation. Thus heightened scrutiny under the *per se* rule is merited. Only after a law passes the *per se* test will a court then apply the "more flexible" *Pike* test, which explicitly seeks to enhance free trade by assuring that burdens on interstate commerce are not "clearly excessive" in relation to local benefits.

Understanding the *per se* rule as a representation guarantee not only explains its relation to the *Pike* test, but also suggests limiting its application to discriminatory laws drawn on *state* lines. Discriminatory laws based on city or county lines treat most in-state commodities the same as out-of-state commodities. *Cf. Evergreen*, 820 F.2d at 1484 (upholding *tri-county* waste restriction because it treats waste from most in-state counties the same as out-of-state waste). To the extent that such laws burden state outsiders, they will also burden most state insiders. Such laws thus guarantee out-of-state interests virtual representation by binding the votes of in-state and out-of-state parties together. The need to apply a rule of *per se* invalidity in order to protect against the discrimination of outsiders is unnecessary since the process of virtual representation has already taken place. *See Kassel*, 450 U.S. at 675; *Raymond*, 434 U.S. at 444 n.18.

In the present case, Michigan's waste restrictions operate in exactly this way. The St. Clair County plan burdens most in-state parties in exactly the same way as out-of-state parties. Should the majority of Michigan residents disfavor St. Clair's policy because of the economic burden it imposes, it could certainly lobby the Michigan legislature to reverse it. The level of political protection provided to state outsiders is, therefore, sufficient for dormant commerce clauses purposes.[13]

2. Extending the Per Se Rule to Local Restrictions Would Unduly Hamper Local Governments in Protecting Public Safety and the Environment.

a. Extending the Per Se Rule to Restrictions Drawn on Local Lines Would Not Further the Principles Announced in City of Philadelphia.

Regardless of whether one sees the dormant commerce clause as primarily a virtual representation guarantee or a free market guarantee, extending the *per se* rule to city- or county-line restrictions would not further the principles announced in *City of Philadelphia*, in any case.

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[13]Petitioner may fairly note that while local discriminatory laws may provide state outsiders virtual representation within the state, such laws do not provide virtual representation within the political subdivision, itself. There are two reasons this observation should not affect dormant commerce clause analysis.

First, all political subdivisions of a state derive their total political power from that state. A guarantee of virtual representation in the state legislature is, in effect, representation in the most fundamental political body available. Because state legislatures remain relatively attentive to their constituencies throughout the state (some of whom will represent shared out-of-state interests), fears that a locally drawn ordinance will wreak tyranny over the rest of the state (or the country) are minimal.

Second, and, perhaps, in recognition of the first point, the Framers simply never implied a principle of *local* representation in the commerce clause. For instance, if a county law discriminated against only out-of-county, but in-state parties, the dormant commerce clause could do nothing to protect a county outsider, who lived within the state, against burdens of that law. In such a case, that party's remedies would be correctly legislative, not judicial. To grant out-of-state parties the right of virtual representation within a city or county, would be to entitle them to a right that even in-state residents do not have.

This Court's *per se* rule came in direct response to the Court's "alertness to the evils of 'economic isolation.'" *City of Philadelphia*, 437 U.S. at 623. Imposing heightened scrutiny on *state* barriers is appropriate since states often exhibit the kind of vigorous, independent competitiveness that leads to such isolation. States represent particularized social, geographic, and economic interests, that other states do not necessarily share. Business markets and economic regulation are often defined by state borders. The size of state populations and economies make limited isolation at least a sustainable (if not a desirable) option, In such cases, more scrupulous attention to commerce clause principles is necessary.

The conduct of local cities or counties, however, does not require such tight rein. Localities within the same state share a similar culture, a common state government, and a common economic base. Their relatively small size requires constant interdependence among themselves in order to sustain their interests. The very immediacy of this interdependence serves to temper protectionist impulses. For this reason, almost all cases that even allege protectionism under the dormant commerce clause challenge *state*-line, not local restrictions.[14]

The difference between local and state barriers is highlighted in this case. St. Clair County is no island of economic isolationism. It has enacted a detailed plan of waste management pursuant to Michigan's Solid

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[14]Thus, it is not surprising that this Court, in articulating its dormant commerce clause doctrine over the years, has spoken almost exclusively in terms of state-line restrictions. *See, e.g., Maine*, 477 U.S. at 148, n.19; *Hughes*, 441 U.S. at 326, 330; *City of Philadelphia*, 437 U.S. at 624; *Baldwin*, 294 U.S. at 523. Petitioner, in fact, cites only three cases in which this Court has reviewed laws that discriminate against both out-of-state and some in-state individuals. *See* Brief of Petitioner at 20-21. In each case this Court invalidated those laws without resort to heightened scrutiny under a *per se* rule. *See* discussion, *supra*, at II.A.

Waste Management Act. Together, with the policies of Michigan's other counties, St. Clair's policy will work to ensure responsible state-wide waste management, while also ensuring that other counties (who do not have to absorb St. Clair's waste) will have capacity for waste from other states. The ordinance pursues sincere health and environmental objectives. Further, disposal companies within the county will undoubtedly suffer economic hardship as well. A mechanical extension of the *per se* rule in this case would presume motives on the part of the county that it could not have realistically had.

b. Extending the Per Se Rule to Restrictions Drawn on Local Lines Would Unduly Hamper Local Governments in Protecting Public Health and the Environment.

As the primary protectors of local health and the local environment, political subdivisions such as cities and counties require broader discretion in addressing local ills than heightened scrutiny, under the *per se* rule, would grant.

Local governments operate best when they are free to seek creative solutions to new problems. *See Chandler v. Florida*, 449 U.S. 560, 579 (1982); *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This Court has specifically praised local innovation in protecting the environment. *See FERC v. Mississippi*, 456 U.S. 747, 786 (1982) (O'Connor, J., concurring in part and dissenting in part) (citing examples).

To apply the current *per se* test to laws drawn on local lines, no matter how small the boundary, would be to condemn popularly supported local legislation simply on the basis that its language could be construed to discriminate against interstate commerce in even an abstract way. That such laws did not expose illegitimate purposes, or that they imposed little

practical burden on outsiders would be irrelevant. Such an extension of the *per se* rule would require courts to strictly scrutinize even inadvertently discriminatory restrictions imposed by towns, neighborhoods, or even local school districts. This kind of expansive judicial supervision would serve neither practicality nor fairness and would be "a far cry from" a constitutional provision explicitly intended to empower the Congress, not the courts.

III. Because of the Special Environmental Characteristics of Waste, the Per Se Rule Should Not Apply Either to State or Local Laws That Regulate Waste.

Michigan DNR and Kentucky, each forward strong arguments for abandoning the *per se* rule in cases involving the regulation of waste transportation and landfill space. Michigan DNR argues that landfill space so closely resembles a "publicly produced and owned" good, that state and local legislatures should be allowed special deference in regulating such space under this Court's reasoning in *Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982). Brief of Respondents Michigan DNR in Opposition to Petition for Writ of Certiorari, 257-35. Kentucky argues that "waste streams" such as those in this case, do not involve articles of commerce at all and suggests this Court should overturn *City of Philadelphia* to the extent it is inconsistent with this reasoning. Amicus Brief of Kentucky at II; *see also* Cox, *Burying Misconceptions About Trash and Commerce*, 20 Capitol L. Rev. 813 (1991) (forthcoming).

Whatcom County supports both of these arguments. Each recognizes the special environmental concerns that justify much waste regulation while ultimately allowing Congress and the courts the necessary authority to

protect against injustice.[15] To the extent *City of Philadelphia* proves inconsistent with such reasoning, Whatcom County respectfully suggests the case be modified. In support of these results (regardless of which theory is used to reach them), Whatcom County wishes to make the following points.

A. Because Waste Restrictions Ultimately Involve Primarily Environmental Policy, Courts Should Review Such Restrictions With Deference.

In arguing for heightened judicial scrutiny in this case, Amicus Curiae, Environmental Transportation Association, convincingly shows the enormous challenge cities and states throughout the country face when addressing today's garbage crisis. *See* Brief of Amicus Curiae, Environmental Transportation Association, in support of the Petitioner's, Petition for Writ of Certiorari, at 2-5. Yet, while ETA decries state environmental practices and even suggests they are inconsistent with federal environmental policy, ETA looks neither to federal environmental statutes nor to agency regulations for relief; it turns to the commerce clause.

This example represents but one of the many ways parties have used recent commerce clause doctrine primarily to effect change in environmental policy, rather than to protect against representational flaws or economic protectionism. The strategic reason is simple enough. Although this Court in *City of Philadelphia*, insisted that the purpose of the *per se* rule was to root out "*economic* isolation,"[16] most waste restrictions

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[15]Whatcom County believes the case for treating waste as different from commerce may be even more compelling where the waste regulated is infectious, radioactive, or otherwise dangerous waste.

[16]*City of Philadelphia*, 437 U.S. at 623.

challenged in court are void of even latent economically protectionist impulses. *See, eg., Diamond Waste, Inc. v. Monroe County, GA.*, 939 F.2d 941, 944 (11th Cir. 1991); *Evergreen*, 820 F.2d at 1485; *Washington State Bldg. & Const. Trades v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982). Plaintiffs challenging such restrictions must, therefore, abandon arguments that local governments are perpetrating *economic* evil, and instead argue that they perpetrate *environmental* evil. In response to such arguments, lower courts interpreting *City of Philadelphia* have grown to see that case as being as much a mandate on environmental policy as economic policy. *See, eg., Spellman*, 684 F.2d at 631-32; *Shayne Bros., Inc. v. Prince George's County*, 556 F. Supp. 182, 186-87 (D. Maryland 1983). Paraphrasing Justice Cardozo's famous line in *Baldwin*, one commentator has summarized the holding of *City of Philadelphia* as "the peoples of the several states must sink or swim together, even in their collective garbage." L. Tribe, *supra*, at 426.

Yet the dormant commerce clause expresses no opinion on environmental policy. To use heightened scrutiny to instill environmental values, oversteps a court's "limited authority" in this area. Whether states and localities should swim together in their collective garbage or, instead, tend their own gardens, is ultimately a question for the legislatures. Courts should defer under the *Pike* test, when reviewing state or local regulations that do not effect economic protectionism, but that instead propose rational solutions to complex environmental problems.

B. Establishing a Free National Waste Stream Through the Commerce Clause Would Not Necessarily Relieve the Waste Crisis.

Even if the dormant commerce clause granted courts the authority to protect, under heightened scrutiny, an unrestricted national waste stream,

there is little indication that the current environmental crisis would subside. Some states and localities, for instance, refuse to treat some types of waste at all. Instead, they transport millions of tons of waste out of their own backyards and into an often over-burdened facility in a small, far-away place. This new "out of sight, out of mind" theory of waste disposal seriously undermines the cooperative spirit among communities that this Court's majority originally envisioned in *City of Philadelphia*. At that time, perhaps, it was reasonable to believe that if the state of New Jersey opened its borders to imported garbage, the "cities of Pennsylvania and New York" might some day reciprocate. *See City of Philadelphia*, 437 U.S. at 629.

But today it does not seem likely that the small towns and counties now used as regional dump sites will ever receive much in return for their sacrifice. Should their ability to control their own environment through innovative laws be hampered, they will have nothing to show, but the weakening of their self-rule and the exploitation of their land.

C. Acceptance of Either Michigan DNR's or Kentucky's Argument Would Not Hamper Congress' Ability to Regulate Waste and Would Not Hamper the Courts' Ability to Review Waste Regulations Under the *Pike* Test.[17]

In considering the arguments of Michigan DNR and those joining the Amicus Brief of Kentucky, Whatcom County emphasizes that neither theory would immunize states and localities from the prudent limitations of commerce clause doctrine. Congress and the courts would correctly retain considerable powers in regulating and protecting interstate commerce, respectively.

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[17]Whatcom County notes that Michigan DNR and those joining the Amicus Brief of Kentucky may not necessarily share this view.

1. Congress Could Continue to Use Its Commerce Powers to Affirmatively Regulate Local Landfill Use and Interstate Waste Transportation.

This Court need not fear that by treating waste as something other than a commercial good, that it would inadvertently eviscerate Congress' authority to affirmatively regulate waste under the commerce clause. Under modern commerce clause doctrine, Congress may regulate any activity under its commerce clause powers as long as such regulation would have a serious or substantial effect on the interstate economy. *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937) (Congress may regulate labor relations at manufacturing plants where work stoppages "would have a most serious effect upon interstate commerce"); *see also Maryland v. Wirtz*, 392 U.S. 183 (1968) (Congress may regulate the extension of federal wage and hour protections to all workers in places producing goods for interstate commerce).[18] "The 'substantial economic effect' test makes irrelevant any determination of what is 'in' or 'out' of the 'current of commerce.'" L. Tribe, *supra*, at 309. As a result, Congress would retain its power to regulate waste of any kind as long as Congress first found that such regulation would have a "substantial economic effect."[19]

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[18]A second holding in *Wirtz*, finding that Congress could properly regulate the wages and hours of *state* employees, was overruled by this Court in *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), which was, in turn overruled in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

[19]Such Congressional "findings" are upheld whenever they rest upon some rational basis. *See* L. Tribe, *infra*, at 309.

2. The Courts Would Retain Their Power to Review Waste Regulation Under the *Pike* Test.

Treating waste as something different from commerce would prevent future courts from applying heightened scrutiny under the *per se* rule to waste restrictions.[20] Courts would, however, retain their abilities to review waste restrictions under the more deferential *Pike* doctrine. Under that doctrine, courts may review any state or local activity that simply "affects" interstate commerce, whether or not the regulation under review directly targets a commercial good. *See, eg., Kassel*, 450 U.S. at 675-79 (reviewing Iowa's highway safety regulations, even though neither the highways nor the trucks they regulated were found to be articles of commerce).

IV. A Law Restricting the Importation of Waste in Order to Protect Health and Safety Should Constitute a Permissible Quarantine.

Whatcom County takes no position on whether or not the Michigan's waste restrictions constitute a permissible quarantine in this case. However, because this Court may wish to analyze the Michigan's waste restrictions under a quarantine exception theory—and because the Court's conclusions would likely govern future cases[21]—Whatcom County offers its view of the appropriate quarantine standard in this context.

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[20]In striking down New Jersey's waste ban under the *per se* rule this Court in *City of Philadelphia* emphasized that New Jersey's impermissible act was to discriminate "against articles of commerce." Indeed, before applying the *per se* rule, this Court first found it necessary to address the issue of whether the interstate movement of waste constituted "commerce" within the meaning of the commerce clause. *Id.* at 621. This Court has yet to impose the *per se* rule on laws regulating anything other than a commercial good. *But cf. Lewis*, 447 U.S. at 42-43 (discussing state regulation of banking services in context of *per se* test, but resting decision on *Pike* analysis).

[21]Specifically, Whatcom County is concerned about future cases involving infectious, radioactive, or other dangerous wastes, where the need for a quarantine exception may be even more compelling than in the present case.

A. Local Governments May Ban Noxious Articles to Protect Health and Safety.

The commerce clause "does not elevate free trade above all other values." *Maine*, 477 U.S. at 150. States may legitimately exercise their police powers to restrict or even ban noxious articles that spread "disease, pestilence, and death." *See City of Philadelphia*, 437 U.S. at 611. Such permissible restrictions on commercial goods constitute "quarantines" and are specifically exempt from ordinary commerce clause proscriptions. *See Campagnie Francaise v. State Bd. of Health*, 186 U.S. 380, 391 (1902) (the Supreme Court has "expressly and unequivocally [h]eld that health and quarantine laws of the several states are not repugnant to the Constitution . . . although they affect foreign and domestic commerce").[22]

As early as 1888, this Court acknowledged a state's power

> to prevent the introduction . . . of articles of trade, which . . . would bring in and spread disease, pestilence, and death, such as rags . . . infected with germs of yellow fever or the virus of small pox.

Bowman, 125 U.S. at 489. In 1986 this Court similarly noted a state's "broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine*, 477 U.S. at 151.

The commerce clause does not grant any business a "right" to inject noxious articles into a state or subdivision against its will. *See Reid*, 187 U.S. at 151. Axiomatically, a business should have no "right" to receive such material across boundaries where a proper quarantine exists.

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[22]For examples of quarantine cases, *see Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Reid v. Colorado*, 187 U.S. 137 (1902); *Campagnie Francaise*, 186 U.S. 380 (1902); *Cf. Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888).

B. Laws That Ban Noxious Articles Only Should be Afforded Strong Deference.

Where quarantines reasonably target the excludable material, courts have historically upheld them without heavy scrutiny. *See, e.g., Asbell*, 209 U.S. at 756-57; *Reid*, 187 U.S. at 152.

In upholding a ban against importing only diseased livestock, this Court wrote:

> As, therefore, the statute does not forbid the introduction into the state of all livestock . . . and as those methods devised by the State . . . *do not appear upon their face unreasonable*, we must, in the absence of evidence showing to the contrary, assume that they are appropriate to the object which the State is entitled to accomplish.

Reid, 187 U.S. at 152 (emphasis in original). Historically, courts have invoked higher scrutiny and inquired into nondiscriminatory alternatives where a law does not even attempt to target noxious articles within a large category of trade. *See, e.g., Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 469 (1878) (state could not exclude cattle without making any distinction between healthy and diseased animals); *Maine*, 477 U.S. at 140, 147-48 (applying heightened scrutiny to a ban on imported minnows that did not distinguish between healthy and infected fish).[23]

C. Waste Quarantines That Protect Health and Safety Should Be Upheld Whether or Not Inside Waste Is Different From Outside Waste.

In *City of Philadelphia*, the majority suggested that this Court's line of quarantine cases depended on whether or not the quarantine targeted the

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[23]Even the inquiry into nondiscriminatory alternatives allows lawmakers some flexibility. In *Maine*, this Court upheld the restriction because the state had made "reasonable" efforts to avoid burdening trade and because, given the state's available knowledge and technology, no better alternative then existed. *See Maine*, 477 U.S. at 147.

transportation of goods or the goods themselves. *City of Philadelphia*, 432 U.S. at 428-29.[24] The majority also implied that a quarantine's purpose was suspect if it permitted noxious articles of the type banned to exist within the state at all. *See id.* at 633 (Rehnquist, J., dissenting). Lower courts following *City of Philadelphia*, have used this reasoning to invalidate waste quarantines that might otherwise have proved permissible. *See BFI v. Whatcom County*, 756 F. Supp. at 486. Whatcom County believes that the majority's treatment of the quarantine issue inadvertently mischaracterized traditional quarantine doctrine, as expressed in cases decided before and after *City of Philadelphia*.

First, the many livestock quarantines upheld earlier in this century address not only health threats posed by transportation, but also those posed by the ultimate disposition of the articles within that state. For instance, in *Reid* this court upheld a livestock quarantine because it reasonably sought to protect Colorado's domestic animals from contracting similar disease. The Court made no distinction between protecting domestic animals from livestock *in transit* and livestock coming into Colorado as a final destination. In fact, the quarantine upheld specifically applied to diseased animals "being brought or sent" into Colorado, implying that Colorado was the final destination. *Id.* at 151; *see also City*

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[24]In relevant part, this Court stated:

> It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce. [See citations omitted.] But those quarantine laws ban the importation of articles such as diseased livestock that require destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.

Id. at 628-29.

of Philadelphia, 437 U.S. at 632-33 (Rehnquist, J., dissenting). Similarly, in *Maine*, this Court upheld a quarantine of live bait fish into the state of Maine, where the quarantine clearly intended to protect against harms associated with the *use* or *consumption* of infected fish, not with the *transportation* of such fish. *See Maine*, 477 U.S. at 141-42.

Further, Whatcom County believes that how a state or subdivision treats similar kinds of noxious articles within its own borders is irrelevant to quarantine analysis. In none of the livestock quarantine cases has this Court ever considered how the state treated in-state diseased cows. *See, e.g., Asbell v. Kansas*, 209 U.S. 251; *Reid v. Colorado*, 187 U.S. 137; *see also City of Philadelphia*, 437 U.S. at 633 (Rehnquist, J., dissenting). Even under heightened scrutiny, this Court in *Maine* did not address Maine's regulation or lack of regulation of diseased fish already present in the state, and it is dismissed as being of "little relevance" the fact that the same fish that were banned by the state could simply swim in from New Hampshire. *Maine*, 477 U.S. at 151.[25] The issue is always whether the discrimination is adequately targeted to those items that the state has a legitimate interest in excluding—the diseased cows, the infected fish, or noxious waste materials.[26]

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[25]In fact, the federal appellate court had previously struck down Maine's quarantine law exactly because "Maine provide[d] no protection against *in-state* parasites and related harms that may exist at large *in-state* hatcheries." *U.S. v. Taylor*, 752 F.2d 757, 765 (1st Cir. 1985) (emphasis added). Yet this Court reversed that decision and did not find that issue relevant to its ultimate analysis. *Maine*, 477 U.S. at 151.

[26]To require that quarantines treat inside and outside trade the same would not only contradict past precedent, but would defeat the very logic behind a "quarantine exception." For if a quarantine did *not* discriminate against outside commerce, there would be no need to justify it as an exception to dormant commerce clause analysis.

Because of the difficulties presented by the quarantine analysis discussed above, Whatcom County suggests that the majority in *City of Philadelphia* ultimately rejected New Jersey's quarantine argument because it did not believe that the ordinary garbage in question posed any significant health dangers to the community.[27] *See City of Philadelphia*, 437 U.S. at 627-29. In contrast, the dissent in that cases accepted the existence of health and environmental dangers, and, on those grounds, would have upheld the ban as a valid quarantine. *Id.* at 629 (Rehnquist, J., dissenting).

CONCLUSION

Under the reasoning stated above, this Court should affirm the judgment of the Court of Appeals for the Sixth Circuit and declare the Michigan's waste restrictions valid under the commerce clause.

Respectfully submitted,

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[27] However, if this Court believes that *City of Philadelphia* cannot be read consistently with the quarantine analysis expressed in *Reid*, *Asbell*, and *Maine*, Whatcom County respectfully suggests *City of Philadelphia* be overruled to that extent.